

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Comcast Cable Holdings, LLC.)	
)	
v.)	Docket No. 09-0254
)	
Commonwealth Edison Company)	

REPLY BRIEF OF COMMONWEALTH EDISON COMPANY

I. Introduction.

Like Comcast, Commonwealth Edison Company (“ComEd”) will substantially rely on the evidence produced and arguments made in previous filings in this proceeding – in particular, those in connection with Commonwealth Edison Company’s Response to Comcast’s Motion for Interim Order filed on March 14, 2012. However, in this Brief, ComEd comments on some of the statements made by Comcast in its earlier Reply Brief and by Mr. Johnson in his “Reply Testimony”, both filed by Comcast on April 11, 2012. In particular, ComEd would point out that those statements support ComEd’s position about the effectiveness of the 2004 Settlement Agreement (“Agreement”) in defining the proper outcome in this case.

In addition, ComEd is filing herewith, Mr. Clayton’s Second Affidavit for the purpose of “closure” to confirm that ComEd has calculated and provided to Comcast the overbilling credit in the manner that Mr. Clayton, in his original affidavit filed on March 14, 2012, said that ComEd would do. Counsel for Comcast have indicated that they have no objection to ComEd’s submission of this affidavit; but they note, and counsel for ComEd acknowledges, that this does not constitute an agreement by Comcast that the

amount of credit for overbilling provided by ComEd goes as far back as Comcast believes it should.

II. The 2004 Settlement Agreement Bars Comcast's Claim for Overbilling Prior to its Submission of Correcting Information in 2011.

In support of its claim that the Agreement “expired” in June 2004, Comcast relies primarily on the Agreement’s requirement that “Comcast will complete its submission of all corrections for the remaining approximately 240 communities within two years of the date of execution of this agreement.” [Comcast April 11, 2012 Reply Brief at 4.]

Comcast states that this is the only applicable period stated in the Agreement. [Id.] Yet Comcast denies the effectiveness of that provision in imposing obligations on Comcast.

Thus, if the Commission were to incorrectly determine that the contract was open-ended – or “aspirational” as ComEd puts it – the contract would have still ended when the accomplishment of the contract became impracticable. It is precisely the impracticability of Comcast determining the addresses of its power supply boxes that frustrated the completion of the audit within the two-year timeframe. As set out in the Testimony of Mr. Johnson, the achievement of that purpose was not merely impracticable, but impossible. [Comcast April 11, 2012 Reply Brief at 4.]

But Comcast’s position in this regard is puzzling because the facts that made the accomplishment of the contract “impractical” (according to Comcast, not ComEd) were well known to both parties for several years before the Agreement. As Mr. Johnson noted:

In the past, ComEd had addresses prior to switching its billing system to CIMS in 1999. *In 2000* Comcast discovered that ComEd was incorrectly billing Comcast for power supply boxes that were either non-existent or not-in-service. As I explained in my Initial Testimony, the parties *knew for many years* that ComEd was incorrectly billing Comcast for a number of power supply boxes, *but ComEd was unable, because it lost address information, to develop a ‘fix’ for the problem.* [Johnson Reply Testimony at 2. Emphasis added.]

and

Until 1999, ComEd's billing system provided Comcast with basic essential information, including the addresses for power supply locations, necessary for Comcast to match the power supply boxes being billed with the power supply boxes that Comcast knew it had in service. In 1999, ComEd replaced its existing billing system, referred to as CIS, with a new system called CIMS. *When ComEd switched billing systems, ComEd lost the records indentifying addresses for powers supplies and thereafter ComEd could only identify power supply units within its system with incomplete information such as cross streets or transformer numbers. Not only did ComEd stop reporting the specific addresses on power supply boxes, it no longer retained the specific address locations of power supply boxes as part of the transall records.* In fact, a large number of ComEd's current records (approximately 7,000) only contain a ComEd transformer number, which is completely useless for identifying which power supply box is associated with a particular bill or location. I recently performed a study of the bills submitted by ComEd to Comcast and determined that almost half of those bills provide only a transformer number. In other words, since Comcast does not have ComEd's internal transformer number information, Comcast receives almost 7,000 bills that it cannot match up with the power supply boxes it is using and thus it cannot determine which of those bills are correct. [Johnson Original Testimony at 5-6. Emphasis added.]

Comcast's logic would compel a conclusion that the contract was void from the beginning because the obligations it placed on Comcast were impractical from "day one." But, of course, that wouldn't make sense. One must assume that the parties to the Agreement knew what they were doing and intended what the Agreement said. The most logical interpretation of the situation, given the Agreement and the facts known to the parties, was that ComEd's billing system conversion in 1999 resulted in the loss of location information concerning Comcast's power supplies. Comcast felt that, with changes it made to its own distribution system, ComEd was probably billing it for service to power supplies that were no longer in service. The parties had done some work to try to address the problem. ComEd knew the deficiencies of its billing system and was willing to settle the whole matter with Comcast for \$1.5 million on Comcast's promise to use its own knowledge about its own system and the location of its own power supplies to "correct" ComEd's bills throughout its system and to complete the task in two years. The

parties knew that the task was substantial, but impossible? No. The Agreement itself notes that some of the work had already been done.

Whereas, in an attempt to reconcile the accounts of both companies, audits of power supplies were conducted in several communities and Comcast supplied additional data indicating the number and type of power supplies in approximately 40 additional communities, but approximately 240 communities have not been audited or reviewed.

In light of the above facts, Mr. Johnson's explanation about why the work was not completed by Comcast in the required two year period rings hollow:

Thus, Comcast had only limited success over the next two years in finding some power supply locations because ComEd could not provide sufficient information to match Comcast and ComEd addresses. [Johnson Original Testimony at 6.]

But Comcast could not have been surprised by the fact that "ComEd could not provide sufficient information to match Comcast and ComEd addresses." If ComEd had that information, there would not have been a billing problem in the first place. Rather, Comcast knew full well what it was supposed to do when it entered into the Agreement; but, because that required a lot of work and a lot of time (see below), Comcast never quite got around to it. With the press of budgets and the dearth of time, business management is often shortsighted. Comcast had \$1.5 million in its pocket. The amount of additional ongoing savings that *might* be realized by getting the billing right was uncertain, and the work would be substantial. In other words, it could wait. Because the delay was Comcast's choice, that is why, despite knowing that it was likely that ComEd may have been billing for some unknown number of power supplies that were no longer in service, Comcast did not complain to the ICC about it after June 2006, the time Comcast insists the Agreement expired.

After ComEd began backbilling to correct a known billing error that arose out of its massive 2007 rate restructuring and threatened Comcast with disconnection when it did not pay the backbilled amounts, Comcast filed its complaint in this case. The total amount of backbilling was very large – over \$4 million – so, in addition to challenging the backbilling, Comcast threw in the claim of alleged overbilling, devoting 11 lines to it out of its 9 page complaint. In light of all the facts, one could not be faulted for concluding that, but for ComEd’s backbilling, Comcast might never have brought its overbilling claim to the Commission.

Comcast’s position that the Agreement had no effect beyond June, 2006 must be viewed for what it is, simply a case of Comcast’s wanting to “have its cake and eat it, too.” Clearly, part of ComEd’s “bargain”, for which it paid handsomely, was the Agreement’s protection against an overbilling claim until after Comcast had submitted its correcting information. Comcast claims that that protection ceased in 2006, but does not speak of any consequences to Comcast for having failed to keep its promise to complete its submission of correcting information by that time. **IF** the Agreement did expire in 2006, and ComEd’s position is that it did not, then Comcast was in severe breach of the Agreement and the measure of ComEd’s damages for that breach is exactly the amount by which Comcast claims that it has been overbilled, since that overbilling would not have occurred if Comcast had fulfilled its obligations under that Agreement.

Even if the Agreement terminated because it was impracticable (a position with which ComEd does not agree as noted above), presumably the parties would be put in a position *status quo ante*. But Comcast makes no mention of returning ComEd’s \$1.5 million (or any portion of that amount) with interest.

III. ComEd was not to Blame for Comcast's delay in submitting correcting information.

And, why, having included its overbilling claim in its 2009 complaint in this docket, did Comcast wait until 2011 to provide ComEd with the information it should have given ComEd before June 2006? In his Reply Testimony, Mr. Johnson claims that he talked with ComEd about doing a wholesale billing change with Comcast-provided addresses and ComEd rejected it.

[I]n 2008 I proposed that Comcast provide ComEd with a list of all in-service power supply boxes so that ComEd could create a new set of billing accounts using that information and discard its irreparably flawed accounts it was using to bill Comcast.

ComEd said it would not use Comcast's list of in-service power supply boxes to create new accounts. *Without ComEd's cooperation, devoting enormous resources by Comcast for that method would have been to no avail.* [Johnson Reply Testimony at 5. Emphasis added.]

However, two facts in evidence demonstrate that Mr. Johnson is likely mistaken about his conversations with ComEd. First, any time Comcast submitted *specific* billing corrections to ComEd, ComEd implemented the changes. [Johnson Original Testimony at 11-12. See also the affidavits of Mr. Clayton, Ms. Johnson-McKenzie, and Mr. Lubawski submitted by ComEd on March 14, 2012.]

Second, despite the fact that Mr. Johnson claims that ComEd rejected his wholesale substitution approach in 2008, Comcast undertook the significant work necessary to prepare such a list, "*devoting enormous resources by Comcast for that method,*" and submitted it to ComEd in 2011. If Comcast did no work to develop its own location list because ComEd rejected its proposal in 2008, what caused Comcast to suddenly change its mind about doing all that work in 2011, in spite of ComEd's alleged prior refusal to accept the results? The task was daunting:

Creating a list of power supply boxes that were serviced by ComEd an extremely time consuming process for Comcast because it was necessary to remove from the status monitoring reports all power supply boxes served by non-ComEd electric providers, such as municipal utilities. Because municipal boundaries with ComEd are sometimes difficult to determine, it was necessary to manually review many of these accounts. Sometimes I could use electronic mapping services, other times I had to physically drive to locations to determine whether a power supply box was served by ComEd. I estimate that it took me *several hundred hours*, for just that part of the task, to create the lists that I provided to ComEd in 2011. [Johnson Reply Testimony at 5-6. Emphasis added.]

Of course the task was daunting, the parties knew it was. That is why the Agreement obligated Comcast to devote its energy to only 10 of the 240 unfinished communities each month, so that it could take a full *two years* to complete the project.

Then, without the promise of cooperation by ComEd, which had previously allegedly been denied, why did Comcast and Mr. Johnson do the necessary work? Mr. Johnson says:

I spent significant amounts of time on this project in 2011 because it was clear that, whatever ComEd's objections might be, it was necessary for purposes of this proceeding to precisely determine the number of incorrect ComEd bills.

Of course it was necessary, but not only for this proceeding, but also for the purposes of the 2004 Settlement Agreement in which the parties effectively acknowledged that ComEd did not have useful location information. ComEd submits that it would have been illogical for it to have refused Mr. Johnson's offer when all of the evidence seems to indicate that it was a practical solution to the billing issue.

IV. Conclusion.

In light of the foregoing and the arguments previously made and evidence submitted, ComEd requests that the Commission issue an order terminating this case and making the following findings:

- that Comcast's claim of overpayment for service to nonexistent or not-in-service power supply boxes is limited by the 2004 Settlement Agreement which requires Comcast to provide ComEd with the information it needs to correct the billing and then limits ComEd's obligation to making the correction on a going-forward basis only, without issuing any back credit for overbilling, or, in the alternative, that Comcast breached the 2004 Settlement Agreement by not submitting correcting information in the time required and that ComEd's measure of damages is the amount of overbilling claimed by Comcast up to the time it submitted correcting information in 2011;
- that ComEd's credit mechanism described in paragraphs 14-22 of Mr. Clayton's Original Affidavit and confirmed in his Second Affidavit properly compensated Comcast for any overpayments;
- that Comcast's challenge to ComEd's backbilling in installments is barred; and
- that all late payment charges assessed by ComEd on amounts withheld by Comcast are proper because Comcast did not remit payment to ComEd within 14 days of the issuance of the Interim Order which dismissed Comcast's claims in that regard, or, in the alternative, that all late payment charges on those unpaid backbilling installments that were past due when Comcast filed its Complaint in this proceeding are proper.

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served electronically on counsel for Comcast on this 19th day of June, 2012.

/s/ Michael S. Pabian
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